UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY J. DAHL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2724.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

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The Bell Press, Printers

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STATEMENT.

By an indictment found and returned in the United States District Court for the Western District of Washington, Northern Division, on the 19th day of March, 1915, the plaintiff in error and one William A. McGee were charged with conspiring together, "and together and with divers

other persons to the said grand jurors unknown to commit an offense against the United States, to-wit, to violate section eleven of the Act of May 6, 1882, as amended and added to by act of July 5, 1884, in this that it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly and unlawfully bring and cause to be brought into the United States and into the Northern Division of the Western District of Washington in said United States from the Province of British Columbia in the Dominion of Canada, by land, certain Chinese alien persons not lawfully entitled to enter the United States, and not entitled to be or remain in the United States at all, and it was further the object and purpose of the said conspiracy to wilfully and knowingly aid and abet the bringing of said Chinese aliens into the United States by land from the Province of British Columbia aforesaid; they, the said Chinese alien persons, not being lawfully entitled to be or remain in the United States at all; all in violation of the said mentioned Act." The indictment contains three counts and sets forth seventeen overt acts, which are alleged to have been done in pursuance of and to perfect the object of said unlawful conspiracy. (Tr. pp. 1-13). To this indictment, the plaintiff in error interposed his separate demurrer upon the ground that the matters and thing alleged therein do not constitute

any offense against the laws or sovereignty of the United States. (Tr. p. 18). The demurrer was overruled. (Tr. p. 19). Thereafter, on June 15, 1915, the case came on for trial before the Honorable Jeremiah Neterer presiding and a jury duly empaneled. Upon application of the Government, a separate trial as to the plaintiff in error, Dahl, was ordered.

The plaintiff in error seasonably objected to the introduction of any evidence upon the ground, "That the indictment nor any count thereof does not state facts sufficient to constitute any offense or crime against the United States", which objection was overruled and exception allowed. (Tr. p. 36). Evidence was introduced by the Government tending to show *inter alia* that on the night of February 23rd, 1915, Dahl and McGee, together with four Chinamen, were arrested at a point in the Northern Division of the Western District of Washington, near the international boundary line. They were in an automobile driven by McGee. (Tr. pp. 36 & 37). That thereafter the Chinamen were given the customary hearing and examination under the imigration laws and found to be not entitled to enter the United States and a warrant for their deportation had been issued. (Tr. pp. 36-41). The Government also produced the Chinamen, who testified that they were born in China, had never before been in the United States and were not en-

titled to be or remain therein. (Tr. pp. 46 & 47). This evidence was all received over repeated objections on the part of Dahl and, together with co-related evidence also objected to, is hereinafter in this brief set forth in detail and for the sake of brevity is here omitted. When the Government rested its case Dahl requested the Court to direct a verdict in his favor urging both the insufficiency of the indictment and also of the evidence. His motion was denied and exception allowed. (Tr. p. 42). No evidence was offered on behalf of Dahl and on June 4, the jury returned a verdict finding him guilty on all three counts. (Tr. p. 20). Thereafter he moved for judgment *non obstante veredicto* and in the alternative for a new trial, the latter motion being predicated in part upon the following grounds: Error in law occurring at the trial and excepted to at the time. (Tr. p. 21). Both of these motions were denied. (Tr. p. 23). And on July 1st the defendant was sentenced to imprisonment in the United States Penitentiary at McNeil's Island for the term of fifteen months on each count, to run concurrently. (Tr. p. 29). From that judgment the case is brought to this Court by writ of error. (Tr. p. 80 & 81).

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling the demurrer of the defendant to the indictment, and holding that the same stated facts sufficient to constitute a crime against the United States.

II.

The Court erred in holding and deciding over the objection of the defendant that said indictment was sufficient as a matter of law to permit the introduction of evidence thereunder against the defendant, and permitting over the objection of defendant evidence to be introduced thereunder.

III.

The Court erred in denying defendant's motion for a directed verdict in his favor on each of the counts of said indictment.

IV.

The Court erred in permitting the introduction of evidence in the following particulars:

"Q. What did you find in regard to each of these four Chinese?

MR. GORDON: Objected to as incompetent, irrelevant, immaterial and not the best evidence. Objection overruled; exception allowed.

A. I found the Chinese had never made application for admission and requested the Secretary of Labor to issue a warrant of arrest.

Q. In regard to this particular hearing, whether that was under the Chinese immigration law as to aliens?

MR. GORDON: I object to that as being incompetent, irrelevant and immaterial; objection overruled; exception allowed.

A. Under the immigration law.

Q. Now, this hearing you have just testified to was held under the immigration law prior to the time of the receipt of warrant of arrest?

MR. GORDON: I object to that as immaterial and not the best evidence; objection overruled; exception allowed.

A. Yes, sir. The preliminary hearing on which I based my application for warrant of arrest and which warrant was received in due course of call.

Q. I show you paper, which I will ask be marked Plaintiff's Exhibit 3, and ask you if that is the warrant of arrest you received in this case?

MR. GORDON: Same objection. Objection overruled. Exception allowed.

A. This is the warrant of arrest I received from the assistant secretary of labor.

Q. This warrant of arrest, is this the next step after your report of the hearing is forwarded to Washington?

A. It is.

MR. GORDON: It may be considered all under the same objection before saved?

THE COURT: Yes.

Q. And under that warrant you held another hearing?

A. I held a regular hearing under the warrant of arrest, under the immigration law.

Q. And what was your finding?

MR. GORDON: Same objection; same ruling; exception allowed.

A. That they didn't have the right to enter the United States and recommended that a warrant of deportation be issued.

Q. And did you receive a warrant of deportation?

A. I did receive a warrant of deportation through the mail, in the regular channel.

MR. MOODIE: Offer that in evidence.

MR. GORDON: Objected to as being immaterial.

Q. This warrant of deportation is the next step after the warrant of arrest and hearing?

A. It is.

MR. MOODIE: I offer them both in evidence.

MR. GORDON: I make the same objection—incompetent and not the best evidence. Objection overruled; exception allowed.

Q. At the time of those hearings did the Chinese present any chop chees or certificates entitling them to be in the United States? Objected to; objection overruled; exception allowed.

A. They did not. In answer to my question to the four if they had any authority to be in the United States they said they hadn't, each and every one.

MR. GORDON: I move to strike the answer. Motion denied. Exception allowed.

Q. What is the present status of these Chinese, in regard to what is going to be done?

MR. GORDON: Objected to as calling for a conclusion.

THE COURT: Objection overruled. Exception allowed.

A. They are under order of deportation to China."

V.

The Court erred in not sustaining defendant's motion for a directed verdict, or for judgment *non obstante veredicto*, for the reason that the names of the Chinese persons referred to in the indictment and in the evidence were known to the United States district attorney and to the grand jury previous to the return of the said indictment, and such names were not set forth in said indictment.

VI.

The Court erred in denying defendant's motion for judgment *non obstante veredicto*.

VII.

The Court erred in denying defendant's motion for a new trial.

VIII.

Insufficiency of the evidence to support the verdict or judgment.

ARGUMENT.

The errors assigned present but two principal questions, which may be stated, as follows:

First—Is the indictment sufficient to charge a conspiracy under section 37 of the Criminal Code (R. S. Sec. 5440)?

Second. Did the Court err in permitting certain evidence set forth in the assignment?

If these are resolved against the plaintiff in error, then we ask consideration of the further question which relates to the fifth assignment of error, namely,

Third. Did the Court err in denying our several motions, viz.: For a directed verdict, for judgment *non obstante veredicto*, to arrest judgment or in the alternative for a new trial?

SUFFICIENCY OF THE INDICTMENT.

It will be observed that in all three counts of the indictment, it is alleged that the purpose of the conspiracy was "To * * * bring and cause to be brought into the United States * * * *certain Chinese alien persons* not lawfully entitled to enter, etc." The indictment does not aver that the persons, so to be brought in, were unknown to the grand jurors and the language of the indictment excludes the theory that the conspiracy contemplated bring-

ing in all or divers and sundry Chinamen who might be desirous of entering. On the contrary, it alleges that the purpose was to bring in "certain Chinamen", from which it may be pre-supposed that the names of the precise persons which the conspiracy contemplated should be brought in were known. Proceeding on that assumption, we submit that under the rule of certainty required in indictments the names of the Chinamen should have been set forth in the indictment.

United States v. Simmons, 96 U. S. 360.

United States v. Britton, 108 U. S. 199.

Petebone v. United States, 148 U. S. 197.

In this respect the indictment differs from that in the case of *Wong Din v. United States*, 35 Federal 702, wherein it was alleged that the Chinese persons were unknown to the Grand Jurors and where this Court at page 705 said: "These things, if unknown, could not be more clearly stated."

DID THE COURT ERR IN ADMITTING CERTAIN EVIDENCE SET FORTH IN THE ASSIGNMENT OF ERRORS?

It will be noticed that nowhere does the indictment charge that any Chinamen were actually brought into the country. There are seventeen overt acts set forth as having been committed in effecting the purpose of the conspiracy, but, neither by direct statement nor by any possible inference

can it be gathered from the indictment that the purpose of the conspiracy was consummated by the actual bringing in of any Chinamen. It will, of course, be conceded that under Section 37 (R. S. 5440) it is essential to a good indictment not only that a conspiracy is formed but that some overt act is accomplished to effect it.

Hyde v. United States, 225 U. S. 347.

United States v. Hirsch, 100 U. S. 34.

Hyde v. Shine, 199 U. S. 72.

And since, as, neither in its formal parts, nor in any overt act set forth, does the indictment charge the bringing in of these Chinamen, we submit it was grossly prejudicial to permit the Government to introduce the evidence covered by the assignment.

Williamson v. United States, 207 U. S. 425.

How could any counsel after reading the indictment in the case at bar anticipate that evidence of the character here introduced would be given? If its reception was error, then it is inconceivable to suppose it was anything but prejudicial error. The Chinamen were brought into Court, they were shown to have been arrested with the defendant; that they had just been piloted across the international boundary line; that they had been examin-

ed under the immigration laws and found they were unlawfully in the United States and that a warrant for their deportation had been issued. Whatever doubts respecting defendant's guilt the jury may have entertained up to the time that this evidence was received would at once be set at rest in its contemplation.

THE JUDGMENT SHOULD HAVE BEEN ARRESTED, OR, AT LEAST, A NEW TRIAL AWARDED.

In the course of the trial it was disclosed in the Government's evidence that four certain Chinamen had been actually brought into the country in pursuance of the conspiracy charged. That they were arrested along with Dahl and McGee, and thereafter had been examined agreeably to the rule and custom of the Immigration Office and at the time of the trial were being held for deportation. After this proof was in, by suitable motion for a directed verdict, for judgment *non obstante veredicto*, for arrest of judgment and for a new trial, the sufficiency of the indictment was again challenged as well as the sufficiency of the evidence to sustain a conviction. In the light of this evidence, it becomes clear that the names of the Chinamen *were known to the Grand Jurors*, hence, again adverting to the indictment, we are forced to the conclusion that they were not among the "unknown persons" who, together with

the defendants, joined in the conspiracy, and with this understanding, it is equally clear that the conspiracy becomes one impossible of consummation because lacking the consent of free, moral agents, without whose consent the crime contemplated would be impossible of commission. *United States v. Melfi*, 118 Fed. 899, *United States v. Crafton*, 4 Dillon 145 (Federal cases No. 14881), *Com. v. Barnes*, 132 Mass. 242. *In re Schurman*, 20 Pac. 277. So that the most that can be said is, that a conspiracy was formed between Dahl and McGee for the purpose of entering into a still further conspiracy, with other persons, the purpose of the latter conspiracy being to commit an offense against the immigration laws. A conspiracy to conspire to commit an offense is not an offense (Wharton's Cr. L. 11th Ed. secs. 203-5 & 1605), for manifestly, if one conspiracy may be fastened to another, they might be multiplied without end before the offense is reached. And since, in the light of the proof, the names of the Chinamen arrested along with Dahl and McGee *were known to the Grand Jurors*, it must be concluded that they were not the alleged "unknown persons" to the conspiracy charged. Therefore, in point of fact, the so-called conspiracy which was formed, was a mere futile act of preparation looking to a conspiracy which was thereafter to be formed.

For these reasons we think the judgment should have been arrested, or at least a new trial awarded.

Respectfully submitted,

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